Edward Salvaraj a/l Samathanam v Kumpulan Wang Simpanan Pekerja & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO 25-70-04 OF 2013
ZALEHA YUSOF J
7 MAY 2014

Labour Law — Contributions — Employees Provident Fund — Retirement fund — Whether matters raised were private law — Whether or not letters contained any decision which was amenable to judicial review — Whether applicant had by implied waiver, acquiescence or unreasonable delay lost right to relief by virtue of failure and/or omission and/or neglect to bring claim on his own against respondents — Whether applicant's application for judicial review time-barred

The applicant commenced employment with the first respondent and part of the terms and conditions of his service was contribution to SPF which was a retirement fund for the benefit of all of the first respondent's employees. However in 1975, pursuant to Service Circular No 1 of 1975, the Harun scheme of service was introduced. The applicant chose to accept the revised terms and conditions of service pursuant to the Harun Scheme which made no provision for any contribution to be made to SPF. In 1997 pursuant to Service Circular No 3 of 1977, the Cabinet scheme was introduced and the applicant chose to accept the terms and conditions of services pursuant to the Cabinet scheme and opted for the pension scheme as provided for in the Cabinet scheme. Subsequently, the applicant requested that his existing credits in the SPF together with interest be transferred to the Employee Provident Fund ('EPF'). The applicant was appointed to the post of *Pegawai* KWSP subject to a probation period of not less than one year. However, before he was confirmed, he chose to voluntary retire and be re-appointed under the new term and conditions of service of the EPF Remuneration Scheme, introduced vide Service Circular No 3 of 1994. He was re-appointed as *Pegawai* KWSP and upon voluntary retirement, the applicant elected to accept full pension and retirement benefits and in line of the new scheme, the first respondent's share of contributions to the EPF and the SPF in respect of the applicant's term of service inclusive of interest was transferred to Kumpulan Wang Amanah Pencen ('KWAP'). The first respondent issued a letter to the second respondent stating that as at December 1993 the Government's share of total contributions including dividend was RM59,184.15, but that only a sum of RM52,781.58 was to be transferred to KWAP because the applicant had previously withdrawn part of the money. Accordingly, the second respondent was advised to claim the balance or differential sum from the applicant. The applicant was

informed of the details of his pension and made several appeals to the second respondent for the refund of his credits in SPF but was notified by the second respondent that his appeal was refused. The applicant appealed to the first respondent that the last drawn salary to be taken into consideration when computing his pension should have been his last drawn salary as *Pegawai* KWSP. As the applicant at the time of voluntary retirement had not been confirmed in the post of *Pegawai* KSWP, the applicant was informed by the first respondent that his appeal was refused. Hence, this judicial review application was filed. The issues that arose for the court's determination were whether the matters raised by the applicant were matters arising in private law; whether or not the letters contained any decision of the first respondent or second respondent which was amenable to judicial review; whether the applicant had by implied waiver, acquiescence or unreasonable delay lost the right to relief by virtue of his failure and/or omission and/or neglect to bring a claim on his own against the respondents; and whether the applicant's application for judicial review is time-barred.

Held, dismissing the application:

(1) The applicant's cause of action, if any, laid in the sphere of private law. The transfer of the applicant's SPF credits to the KWAP, as submitted by the respondent, was merely an implementation of the option chosen by the applicant upon voluntary retirement, options made available to him under the terms and conditions of service he chose to accept. Similarly, upon his promotion, the applicant had accepted that he was subject to a probationary period of one year. Subsequently, he chose to voluntarily retire before the expiry of that one year. The applicable terms and conditions provided that the last drawn salary to be used for computation of pension was that earned in the last confirmed position. Every claim or argument put forward or relied upon by the applicant was peculiar to his personal rights as alleged by him (see para 11).

(2) The applicant's application here was not based upon any performance by the first respondent of its public duty to manage and administer the EPF. The fact that the applicant was deemed to be a public servant within the meaning of the Penal Code did not make him a public servant as he did not fall under the categories of public officers as set out in art 132(1) of the Federal Constitution. Even the Service Circulars were adopted by the first respondent at its absolute discretions, the rejection of the applicant's appeal as found in the second respondent's letters was nothing more than a management decision which was not part of the respondents' duties as empowered by statute or a public body. It was certainly not a decision in the field of public law. Hence it was not amenable to judicial review as the respondents were not under any duty to hear such appeals (see paras 13–15).

(3) The respondent had been aware since 1994 that his SPF credits were transferred to KWAP and that his pension would be computed based on his last drawn salary in his confirmed position. However, the applicant waited until May 2010 to appeal to the second respondent on his SPF issue and April 2012 to the first respondent on his pension issue. The applicant had waited for more than 16 years and in such circumstance, the applicant had impliedly waived and acquiesced the right to claim any relief against the respondents (see paras 16–17).

(4) The applicant's application here clearly had gone beyond the three months period prescribed by the Rules of Court 2012 and there was no extension had been applied or good reasons explained for the delay. No doubt that the applicant had also appealed to the Finance Ministry and Prime Minister's Office. However, as submitted by the respondent, these appeals did not provide good ground for the delay in filing this application for judicial review. Based on the facts and the authorities cited, it was crystal clear that this application for judicial review in the instant case was out of time. This case was suitable to be disposed of under O 14A application as the facts involved in the determination of questions were not in dispute and sufficient for the court to make determination (see paras 20–22).

[Bahasa Malaysia summary

Pemohon telah mula bekerja dengan responden pertama dan sebahagian daripada terma dan syarat perkhidmatannya adalah sumbangan kepada SPF iaitu satu dana persaraan bagi manfaat kesemua pekerja responden pertama. Walau bagaimanapun, pada tahun 1975, di bawah Service Circular No 1 1975, perkhidmatan skim Harun diperkenalkan. Pemohon memilih untuk menerima perkhidmatan skim Harun yang tidak memperuntukan apa-apa sumbangan kepada SPF. Pada 1997, di bawah Service Circular No 3 of 1977, skim Kabinet diperkenalkan dan pemohon memilih untuk menerima terma dan syarat perkhidmatan di bawah skim Kabinet dan memilih skim persaraan yang diperuntukan di bawah skim Kabinet. Seterusnya, permohon memohon agar kredit yang tertunggak dalam SPF bersama-sama dengan faedah dipindahkan kepada Kumpulan Wang Simpanan Pekerja ('KWSP'). Pemohon dilantik menjadi Pegawai KWSP tertakluk kepada tempoh percubaan tidak melebihi satu tahun. Walau bagaimanapun, sebelum dia disahkan, dia memilih untuk bersara secara sukarela dan dilantik semula di bawah terma dan syarat perkhidmatan yang baru bagi Skim Bayaran EPF, yang diperkenalkan melalui Service Circular No 3 1994. Dia dilantik semula sebagai Pegawai KWSP dan dengan persaraan sukarela, pemohon memilih untuk menerima pencen penuh dan faedah-faedah persaraan dan selaras dengan skim baru, bahagian sumbangan responden pertama terhadap EPF dan SPF bagi terma perkhidmatan termasuk faedah dipindahkan kepada Kumpula Wang Amanah Pencen ('KWAP'). Responden pertama mengeluarkan surat kepada responden

kedua menyatakan bahawa setakat Disember 1993, bahagian sumbangan penuh kerajaan termasuk dividen adalah RM59,184.15 tetapi hanya sejumlah RM52,781.58 yang dipindahkan kepada KWAP kerana pemohon telah mengeluarkan sebahagian wang tersebut. Responden kedua dinasihatkan untuk menuntut baki jumlah daripada pemohon. Pemohon dimaklumkan mengenai butir-butir pencennya dan membuat beberapa rayuan kepada responden kedua bagi pemulangan semula kreditnya dalam SPF tetapi dimaklumkan oleh responden kedua bahawa rayuannya dinafikan. Pemohon merayu kepada responden pertama bahawa gaji terakhir yang diambil yang dipertimbangkan apabila mengira pencennya sepatutnya menjadi gaji terakhir yang dikeluarkan sebagai Pegawai KWSP. Oleh kerana pemohon, semasa persaraan sukarela tersebut belum disahkan sebagai Pegawai KWSP, pemohon dimaklumkan oleh responden pertama bahawa rayuannya ditolak. Oleh itu, permohonan semakan kehakiman difailkan. Isu-isu yang berbangkit bagi pemutusan mahkamah adalah sama ada hal-hal perkara yang dibangkitkan oleh pemohon adalah hal-hal perkara yang berbangkit dalam undang-undang persendirian; sama ada atau tidak surat-surat tersebut mengandungi apa-apa keputusan oleh responden pertama atau kedua yang boleh disemak secara kehakiman; sama ada pemohon telah, melalui penepian, persetujuan tersirat atau kelewatan tidak munasabah, hilang hak untuk melepaskan akibat kegagalan dan/atau ketinggalan dan/atau kecuaian untuk membawa tuntutannya sendiri terhadap responden-responden; dan sama ada permohonan pemohon bagi semakan kehakiman terhalang oleh had masa.

Diputuskan, menolak permohonan:

(1) Kausa tindakan pemohon, jika ada, terletak dalam sfera undang-undang persendirian. Pindahan kredit SPF pemohon kepada KWAP, seperti yang dihujahkan oleh responden, hanyalah sekadar implementasi pilihan yang dipilih oleh pemohon semasa persaraan sukarela, pilihan yang diberikan kepadanya di bawah terma dan syarat perkhidmatan yang dipilihnya. Begitu juga, dengan kenaikan jawatannya, pemohon telah menerima bahawa dia tertakluk kepada tempoh percubaan selama setahun. Selepas itu, dia memilih untuk bersara secara sukarela sebelum luput tarikh satu tahun tersebut. Terma dan syarat yang terpakai memperuntukkan bahawa gaji terakhir yang dikeluarkan digunakan untuk mengira pencen adalah yang sepatutnya diterima semasa jawatan terakhir yang disahkan. Setiap tuntutan atau hujahan yang dikemukakan atau disandarkan oleh pemohon mewakili hak-hak persendirian seperti yang didakwa olehnya (lihat perenggan 11).

(2) Permohonan pemohon ini bukanlah berdasarkan apa-apa pelaksanaan oleh responden pertama sebagai kewajipan awamnya untuk menguruskan dan mentadbir EPF. Fakta bahawa pemohon dikatakan merupakan penjawat awam dalam maksud Kanun Keseksaan tidak menjadikannya penjawat awam kerana dia tidak terjumlah di bawah

kategori pegawai-pegawai awam yang dinyatakan dalam perkara 132(1) Perlembagaan Persekutuan. Walaupun *Service Circulars* diguna pakai oleh responden pertama dengan budi bicara penuhnya, penolakan rayuan pemohon seperti yang terdapat dalam surat-surat responden kedua tidak lebih daripada keputusan pengurusan yang bukan sebahagian daripada kewajipan responden-responden seperti yang diberikan oleh statut atau badan awam. Ia tentunya bukan keputusan dalam ruang undang-undang awam. Oleh itu, ia tidak bukan disemak secara kehakiman kerana responden-responden tidak berkewajipan membicarakan rayuan-rayuan sedemikian (lihat perenggan 13–15).

(3) Responden sedar sejak tahun 1994 bahawa kredit SPFnya dipindahkan kepada KWAP dan bahawa pencennya akan dikira berdasarkan gaji terakhir yang dikeluarkan beliau semasa jawatannya yang disahkan. Walau bagaimanapun, pemohon menunggu hingga Mei 2010 untuk merayu kepada responden kedua mengenai pengeluaran isu SPF dan April 2012 kepada responden pertama mengenai isu pencennya. Pemohon telah menunggu hingga lebih 16 tahun dan dalam hal keadaan sedemikian, pemohon telah secara tersirat mengenepikan dan bersetuju dengan hak untuk menuntut apa-apa relief terhadap responden-responden (lihat perenggan 16–17).

(4) Permohonan pemohon jelas melampaui tempoh tiga bulan yang dinyatakan oleh Kaedah-kaedah Mahkamah 2012 dan tiada lanjutan yang terpakai atau sebab-sebab munasabah yang dikemukakan akibat kelewatan tersebut. Tiada keraguan bahawa pemohon juga memohon kepada kementerian kewangan dan pejabat perdana menteri. Walau bagaimanapun, seperti yang dinyatakan oleh responden, rayuan-rayuan ini tidak memperuntukkan alasan yang baik bagi kelewatan dalam memfailkan permohonan bagi semakan kehakiman ini. Berdasarkan fakta dan autoriti-autoriti yang dinyatakan, adalah jelas bahawa permohonan bagi semakan kehakiman dalam kes ini melebihi had masa. Kes ini sesuai dilupuskan di bawah permohonan A 14A kerana fakta-fakta yang terlibat dalam pemutusan tidak dipertikaikan dan cukup untuk diputuskan oleh mahkamah (lihat perenggan 20–22).]

Notes

For a case on Employees Provident Fund, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 965.

Cases referred to

Ahmad Hariri & Ors v Lembaga Pelabuhan Kelang [1982] 2 MLJ 28, FC (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor [1998] 1 MLJ 224, HC (refd)

Country Heights Holdings Bhd v Rating Agency Malaya Bhd [2008] MLJU 136; [2008] 8 CLJ (refd)
Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor [1997] 2 MLJ 361; [1997] 3 CLJ 135, FC (refd)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8; [2003] 4 CLJ 337, CA (refd)
Quek Chek Yen v Majlis Daerah Kulai [1986] 2 MLJ 290, SC (refd)
R v London Borough of Redbridge Ex parte 'G' [1991] COD 398, QBD (refd)
Regina v National Coal Board ex parte National Union of Mineworks [1986] 1 CR 791 (refd)
Seloga Jaya Sdn Bhd v UEM Genisys Sdn Bhd [2007] 7 MLJ 385; [2008] 2 CLJ 686, CA (refd)
Subramanyah a/l AJ Karrupiah v Bank Negara Malaysia [2011] 3 MLJ 454; [2011] 2 CLJ 178, CA (refd)
Sulaiman Mat Tekor & Ors v National Population and Family Development Board [2009] 7 MLJ 325, HC (refd)
Wendal Swann v Attorney General of the Turks and Caicos Islands [2009] UKPC 22, PC (refd)
Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 MLJ 161; [2013] 4 CLJ 193, FC (refd)

Legislation referred to

Federal Constitution art 132(1)
Penal Code
Rules of Court 2012 O14A r 1, O53 r 6

Malathi a/p Natarajan (Ghandi) for the applicant.
Selvamalar Alagaratnam (Lee Li Hoong and Sara Lau Der Yin with him) (Skrine) for the first respondent.
Haryati bt Ahmad, (Federal Counsel, Attorney General's Chambers) for the second respondent.

Zaleha Yusof J:

[1] Under the judicial review application, the applicant seeks for the following order:

(a) a declaration that the staff provident fund ('the SPF') is not an approved fund and that the applicant's savings in the SPF cannot be considered as employer's contribution;

(b) that the second respondent's decision that the applicant's savings in the SPF is considered as employer's contribution is quashed;

(c) that the decision of both respondents that the applicant's salary as at 31 May 1994 is only RM2,108 is quashed; and

(d) that the respondents be compelled to return the applicant's savings in the SPF to him.

[2] However, in encl 12, the first respondent filed an application under O 14A r 1 of Rules of Court 2012 seeking for determinations of the following four questions of law without full hearing of the judicial review application:

(a) whether the matters raised by the applicant are matters arising in private law;

(b) whether or not the letters dated 4 January 2013 and 9 January 2013 contain any decision of the first respondent or second respondent which is amenable to judicial review;

(c) whether the applicant has by implied waiver, acquiescence or unreasonable delay lost the right to relief by virtue of his failure and/or omission and/or neglect to bring a claim on his own against the respondents; and

(d) whether the applicant's application for judicial review is time barred.

BRIEF BACKGROUND FACTS

[3] The applicant commenced employment with the first respondent on 2 October 1962 and part of the terms and conditions of his service was contribution to SPF which was a retirement fund for the benefit of all of the first respondent's employees.

[4] However in 1975 pursuant to service circular No 1 of 1975, the Harun Scheme of service was introduced. The applicant chose to accept the revised terms and conditions of service pursuant to the Harun Scheme which made no provision for any contribution to be made to SPF.

[5] In 1997 pursuant to service circular No 3 of 1977, the cabinet scheme was introduced and the applicant chose to accept the terms and conditions of services pursuant to the cabinet scheme and opted for the pension scheme as provided for in the cabinet scheme. Subsequently, the applicant requested that his existing credits in the SPF together with interest thereon be transferred to the Employee Provident Fund ('EPF').

[6] On 27 July 1993 the applicant was appointed to the post of *Pegawai* KWSP subject to a probation period of not less than one year. However, before he was confirmed, he chose to voluntary retire and be reappointed under the new term and conditions of service of the EPF Remuneration Scheme,

introduced vide service circular No 3 of 1994; with effect from 31 May 1994. He was reappointed as *Pegawai* KWSP (Gred 21) on 1 June 1994. Upon voluntary retirement, the applicant elected to accept full pension and retirement benefits and in line of the new scheme, the first respondent's share of contributions to the EPF and the SPF in respect of the applicant's term of service inclusive of interest was transferred to *Kumpulan Wang Amanah Pencen* ('KWAP').

[7] Thereafter, the first respondent issued a letter to the second respondent stating that as at December 1993 the Government's share of total contributions including dividend was RM59,184.15, but that only a sum of RM52,781.58 was to be transferred to KWAP because the applicant had previously withdrawn part of the money. Accordingly, the second respondent was advised to claim the balance or differential sum from the applicant. The applicant was informed of the details of his pension in October 1994.

[8] The applicant made several appeals to the second respondent for the refund of his credits in SPF starting by a letter dated 25 May 2010 but was notified by the second respondent on 26 January 2011 and thereafter on 4 January 2013 that his appeal was refused.

[9] On 13 April 2012, the applicant appealed to the first respondent that the last drawn salary to be taken into consideration when computing his pension should have been his last drawn salary as *Pegawai* KWSP. As the applicant at the time of voluntary retirement had not been confirmed in the post of *Pegawai* KSWP, the applicant was informed by the first respondent vide a letter dated 24 September 2012 that his appeal was refused. The applicant appealed again to the first respondent on 16 October 2012. On 9 January 2013, due to further requests for reconsideration by the applicant, the first respondent, in maintaining the decision it conveyed vide the letter dated 24 September 2012, refused the applicant's appeal in respect of the computation of his pension.

[10] Hence, the judicial review application was filed and subsequently the O 14A application which is now before me.

DECISION

[11] I have perused the cause papers and submissions made by the parties. On the first question, it is my considered view that the applicant's cause of action, if any, lies in the sphere of private law. The transfer of the applicant's SPF credits to the KWAP, as submitted by the respondent, was merely an implementation of the option chosen by the applicant upon voluntary retirement, options made available to him under the terms and conditions of

service he chose to accept. Similarly, upon his promotion, the applicant had accepted that he was subject to a probationary period of one year. Subsequently, he chose to voluntarily retire before the expiry of that one year. The applicable terms and conditions provide that the last drawn salary to be used for computation of pension is that earned in the last confirmed position. Every claim or argument put forward or relied upon by the applicant is peculiar to his personal rights as alleged by him.

[12] As stated by Clive Lewis in his book *Judicial Remedies in Public Law*, (3rd Ed, 2004) Sweet and Maxwell, not every act of a statutory body necessarily involves an exercise of statutory power. The mere fact that the first respondent is a body created by statute does not automatically render it an appropriate respondent to judicial review proceedings.

[13] To my mind, the applicant's application here is not based upon any performance by the first respondent of its public duty to manage and administer the EPF. In *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145, the Federal Court considered the Privy Council case of *Wendal Swann v Attorney General of the Turks and Caicos Islands* [2009] UKPC 22 in which it was held as follows:

> The appellant's complaint is that he was wrongly deprived of his remuneration of $90,000 a year for a period of three months (or thereabouts), during which he was only paid at the rate of $30,000 a year. In order to found a legal claim on that complaint, the appellant would have to establish that he had an enforceable right to be remunerated at the rate of $90,000 a year as chairman of the PSC.
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> In the Board's view, the only basis for advancing such a right, in the light of the evidence and the arguments which have been presented, arises out of conversations which, according to the appellant, he had with the Governor and the Chief Secretary, in which they 'invited' him 'to continue in the office of chairman on (a full time) basis' and 'on the basis that the base salary was to be ... $90,000 ... per annum' and that he 'decided to accept the challenge, including taking up residence in Grand Turk'. which he duly did (quoting from paras 10-13 of the appellant's first affidavit, sworn on 26 January 2007).
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> Accordingly, the appellant's complaint amounts to a straight forward private law claim for around $15,000, being the difference over a period of about three months between (a) $90,000 a year, the rate of remuneration to which he claims to have been entitled, and (b) $30,000 a year, the rate at which he was actually paid. The basis of his entitlement is a conversation, or a series of conversations, described in paragraphs 10 to 13 of his affidavit, cited in paragraph 11 of this judgment. His claim is thus almost certainly in contract (although it is conceivable that it could be founded on an estoppel), and whether it is made out will turn on oral evidence.
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> In those circumstances, it seems clear that the appellant should not have sought to bring his claim by way of judicial review, and should have issued a writ. That is primarily because his claim is, on analysis, a classic private law claim based on breach of contract (or, conceivably, estoppel) ...

The finding of the Privy Council is based on the fact that this claim is for breach of contract rather than per se against the decision of the authority. Being a private law matter which has little or no public law element, it is more appropriate that the action by the appellant should commence by writ rather than the process set out in O 53.

From the persuasive authorities above, we observed that for the appellant to be amenable for judicial review there must be the presence of an element of public law necessary to attract remedies of administrative law.

[14] I am also of the view that the fact that the applicant is deemed to be a public servant within the meaning of the Penal Code does not make him a public servant as he does not fall under the categories of public officers as set out in art 132(1) of the Federal Constitution. Refer to the Federal Court case of *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361; [1997] 3 CLJ 135 and the Supreme Court case of *Quek Chek Yen v Majlis Daerah Kulai* [1986] 2 MLJ 290 and also the Court of Appeal case of *Subramanyah a/l AJ Karrupiah v Bank Negara Malaysia* [2011] 3 MLJ 454; [2011] 2 CLJ 178. Even the service circulars were adopted by the first respondent at its absolute discretions. Refer to the Federal Court in *Ahmad Hariri & Ors v Lembaga Pelabuhan Kelang* [1982] 2 MLJ 28.

[15] On the second question raised by the first respondent, I am also of the view that the rejection of the applicant's appeal as found in the second respondent's letters dated 26 January 2011 and later dated 4 January 2013; and also the first respondent's letters dated 24 September 2012 and later dated 9 January 2013, is nothing more than a management decision which is not part of the respondents' duties as empowered by statute or a public body. It is certainly not a decision in the field of public law. Hence it is not amenable to judicial review as the respondents are not under any duty to hear such appeals. Refer to *Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224 and the English case of *Regina v National Coal Board ex parte National Union of Mineworks* [1986] 1CR 791.

[16] On the third question, it is a fact that the respondent had been aware since 1994 that his SPF credits were transferred to KWAP and that his pension would be computed based on his last drawn salary in his confirmed position. However, the applicant waited until May 2010 to appeal to the second respondent on his SPF issue and April 2012 to the first respondent on his pension issue. In *Sulaiman Mat Tekor & Ors v National Population and Family Development Board* [2009] 7 MLJ 325, the plaintiffs alleged that when the defendant adopted the Harun salary scheme, it had erroneously and unlawfully emplaced the plaintiffs in B13–4 scale. It was inter alia held that by signing the option papers agreeing to the concern to the B13–4 salary scale and not doing anything positive thereafter for thirty two years to protest against that

emplacement, the plaintiffs had acquiesced to the act of the defendant in placing them in that salary scale. At p 338 of the case, the court quoted *Country Heights Holdings Bhd v Rating Agency Malaya Bhd* [2008] MLJU 136; [2008] 8 CLJ 301 and stated the following:

> It is a principle of law that where a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing that right, stands by in such a manner as really to induce the person committing the act, and who might have otherwise have abstained from it, to believe that he assents to its being committed, that person (who stands by) has acquiesced to that act; and that person so standing by cannot afterwards be heard to complain of the act.

[17] Similarly, in this instance, the applicant had waited for more than 16 years and in such circumstance, the applicant had impliedly waived and acquiesced the right to claim any relief against the respondents.

[18] On the last question, I refer to the case of *Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 MLJ 161; [2013] 4 CLJ 193, which involved a judicial review of two decisions made by the second respondent. The second respondent's contentions in the High Court were, inter alia, that the applicants had full and actual knowledge of the first decision made; there was inordinate delay on the applicants' part in seeking recourse to the courts; and that the reference to the second decision was a tactical ploy to circumvent O 53 r 6. The High Court dismissed the judicial review application, and the Court of Appeal upheld its decision. The Federal Court concurred by dismissing the resultant appeal. The Federal Court stated as follows in respect of the delay:

> ... we are of the view that the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial Judge had rejected the explanation for the delay for the extension of time to apply for judicial review, if follows that the Court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant. (Emphasis added.)

[19] Order 53 r 3(6) of the Rules of Court 2012 clearly requires the application to be made promptly within three month from the date when the grounds of application first arose or the decision first communicated. As submitted by the respondents, a plain reading of the letter dated 9 January 2013 shows that a decision not to allow the applicant's request for reconsideration had been made earlier on 24 September 2012 and vide the letter dated 9 January 2013 the first respondent merely reaffirmed its earlier decision. Similarly with respect of the letter dated 4 January 2013 issued by the second respondent, a decision not to allow the applicant's request for

reconsideration had been made earlier on 26 January 2011 and vide the letter dated 4 January 2013, the second respondent was merely reaffirming its earlier decision.

[20] To me, the applicant's application here clearly had gone beyond the three months period prescribed by the Rules of Court 2012 and there was no extension had been applied or good reasons explained for the delay. No doubt that the applicant had also appealed to the Finance Ministry and Prime Minister's Office on 8 March 2011. However, as submitted by the respondent, and I agree, these appeals do not provide good ground for the delay in filing this application for judicial review. The respondent has cited the English case of *R v London Borough of Redbridge ex parte 'G'* [1991] COD 398 which I find to be an authority on this point. In that case, leave for judicial review was granted and the respondent appealed. In allowing the respondent's application to set aside the leave, the learned Stuart-Smith LJ stated as follows:

> *It seems to me that it is plain that the applicant's father knew of the decision which affected his daughter. He must, as it seems to me, take advice at that stage as to whether he has any remedy against the local authority. In fact what he did was to write to his MP and to seek the assistance of his Member of Parliament, but in my judgment a citizen who has a problem with local Government or any other bureaucracy is faced with a choice.*
>
> *He can either seek political means to influence the decision or he can consider whether he has any legal remedies against the authority. If he elects to adopt the first course and it achieves nothing, in my judgment he cannot rely upon that as a ground for extending time and it is no answer to say that until he had exhausted his attempts to persuade his Member of Parliament to assist him that he realised that he might have a ground of complaint against the local authority*. (Emphasis added.)

[21] Based on the facts and the authorities cited, it is crystal clear that this application for judicial review in the instant case is out of time.

CONCLUSION

[22] This case, in my view is suitable to be disposed of under O 14A application as the facts involved in the determination of questions are not in dispute and sufficient for the court to make determination. Refer to Court of Appeal decisions in *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; [2003] 4 CLJ 337 and *Seloga Jaya Sdn Bhd v UEM Genisys Sdn Bhd* [2007] 7 MLJ 385; [2008] 2 CLJ 686.

[23] My answers to the four questions raised by the respondent/applicant of this encl 12 are as follows:

(a) Positive;

(b) Negative;

(c) Positive; and

(d) Positive.

[24] My answers to the questions in my view are sufficient to dispose of the whole of judicial review application brought by the applicant; ie that this matter is not a matter arising in public law, that there is no decision amenable to judicial review, that the applicant in delaying to appeal to the respondent had waived and acquiesced the right to claim any reliefs against the respondent and that this application is clearly out of time. Hence, there is nothing left to be judicially reviewed.

[25] I have considered submissions made by all parties and totally agree with the respondent and therefore allow encl 12; and consequently the judicial review application is dismissed.

Application dismissed.

Reported by Afiq Mohamad Noor